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October 2, 2002

Mr. David Kaiser  
Federal Consistency Coordinator  
Office of Ocean and Coastal Resource Management, NOAA  
1305 East-West Highway, 11<sup>th</sup> Floor  
Silver Spring, MD 20910  
Attention: Federal Consistency Energy Review Comments

Dear Mr. Kaiser:

Thank you for the opportunity to comment on the advance notice of proposed rulemaking (ANPR) regarding procedural changes to the federal consistency process as outlined in the July 2, 2002 Federal Register notice. This response represents the State of Alaska comments on the ANPR. After introductory comments, our response addresses the six questions posed in the notice.

At this time, the State of Alaska does not think it is advisable to change the federal consistency regulations found in 15 CFR 930 for at least four reasons. First, the ANPR does not present a compelling argument regarding the need to reopen the regulations. While the ANPR includes some general statements about problems with consistency reviews of Outer Continental Shelf activities, it does not describe these problems in any detail. We are not convinced there are any serious problems with the current regulations that cannot be solved through consultation. The State of Alaska works with the Minerals Management Service (MMS) and applicants to resolve issues as they arise. Only one Alaska review in the past ten years has been problematic, and this was due to extraordinary circumstances that will be discussed later in this letter.

Second, changes to the CZMA regulations are relatively new, and states, federal agencies and the industry may need to work with them a while before concluding that the regulations are the cause of problems or perceived problems. There has not been enough time to determine conclusively that problems cannot be worked out through means other than a regulation change.

Third, reopening the federal regulations to address perceived problems with OCS reviews would affect all federal consistency reviews. Because Subpart E (consistency for OCS

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exploration and development activities) of the CZMA regulations often refers to Subpart D (consistency for federally permitted activities), addressing many of the issues raised in the ANPR would necessitate changing regulations that apply to all reviews of federally permitted activities.

Fourth, provisions in the CZMA and implementing regulations address coordination of the CZMA and OCSLA in detail. The ANPR does not identify specific problems that would be fixed through a regulation change. Before proceeding further, it would be prudent for the Office of Coastal and Resource Management to sponsor a meeting of the states, industry, MMS and other stakeholders. Such a meeting would provide an opportunity to identify specific issues and alternatives to addressing those issues.

We recognize the complexity of coordinating the requirements and timelines of the three primary federal acts that govern reviews of OCS projects: the Coastal Zone Management Act (CZMA), the National Environmental Policy Act (NEPA), and Outer Continental Shelf Lands Act (OCSLA). Rather than re-open the recently promulgated CZMA regulations, we believe more efficient and effective means exist to address concerns raised in the ANPR. Creation of region-specific memoranda of understanding (MOU) is one avenue that should be explored before re-opening the regulations. In 1995, the State of Alaska and MMS signed an MOU for consistency reviews of OCS oil and gas lease sales. Currently, we are working together to update a 1980 MOU that addresses consistency reviews of exploration and development and production projects.

#### Questions Raised in the ANPR

This section of our comments address each of the six questions posed in the July 2, 2002 Federal Register notice.

1. *"Whether NOAA needs to further describe the scope and nature of information necessary for a State CMP and the Secretary to complete their CZMA reviews and the best way of informing Federal agencies and the industry of the information requirements."*

Existing provisions in the CZMA regulations address information needs for most projects. 15 CFR 930.58 clearly specifies the information that is needed for the state to start its six-month review. As noted in the preamble to the regulations, "additional information may be needed regarding coastal effects or the project's design for purposes of the State agency's review."<sup>1</sup> In such a situation, the state works with the MMS and the applicant to obtain the information.

Describing specific documents in the regulations that a state may need would be ineffective and cumbersome because information needs change from project-to-project. The type of information needs of a state can vary from project-to-project depending on how detailed the EP or DPP is and the complexity of a project. In some instances, information needs may not be known until after an OCS plan is reviewed. Information

<sup>1</sup> See page 77148 of the Friday, December 8, 2000 Federal Register Notice.

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needs for a project with severe ice hazards in the Beaufort Sea will be different from those for a routine project in the Gulf of Mexico. In addition, the use of new technology or use of existing technology in a different environment can lead to unforeseen information needs.

For example, a project proposed in the Alaska OCS involved use of existing technology in a way that had never been done before. Specifically, the project involved a proposal to construct a man-made, ice island drilling platform in deeper waters than had been done previously. This project was proposed for an area of extreme ice hazards. For this project, the state needed more detailed information than it had requested for previous projects. At first, the MMS was reluctant to provide engineering studies and a report by the Certified Verification Agent because of concerns that the reports were too technical for the state reviewers to understand. Through negotiation, the MMS provided this information. Upon review of these documents, the state learned that the proposed project would be located in an area where ice forces were one to two orders of magnitude more dynamic than two of the previous ice islands used for drilling in Alaska waters. This information was critical to the state's consistency finding.

The State of Alaska is working with MMS to develop an MOU that will address information that the state may need during a consistency review. This approach will allow MMS and the state to develop an agreement based on the conditions specific to the Alaska OCS. Rather than describing detailed information needs in regulations, regional MOUs can address the question of information needs tailored a specific area. An attempt to describe possible information needs in regulation would either lead to an excessive "laundry list" of needs or to a list that too narrow in scope to address all projects in the OCS.

Our response to question 3 provides additional comments about information needs when an EA or EIS is needed for an OCS plan.

2. *"Whether a definitive date by which the Secretary must issue a decision in a consistency appeal under CZMA sections 307(c)(3)(A), (B) and 307(d) can be established taking into account consideration of the standards of the Administrative Procedures Act and which, if any, Federal environmental reviews should be included in the administrative record to meet those standards."*

Alaska has not been involved in appeals to the Secretary of Commerce during the past decade. It is our understanding, however, that delays in the process are due mainly to requests from the parties to submit additional information to the record.

3. *"Whether there is a more effective way to coordinate the completion of Federal environmental review documents, the information needs of the States, MMS and the Secretary within the various statutory time frames of the CZMA and OCSLA."*

Clearly, the states and the federal government could improve how they coordinate completion of environmental review documents within the timeframes mandated by the

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CZMA and OCSLA. While the CZMA regulations make an admirable attempt to coordinate CZMA and OCSLA requirements, problems with coordination of federal environmental review documents occur because of unrealistic timeframes imposed by OCSLA and its implementing regulations.

The most troublesome requirement relates to comment deadlines imposed by OCSLA and the related regulations for reviews of Exploration Plans (EPs) and Development and Production Plans (DPPs). For EPs, the MMS has 30 days to approve, disapprove or request modifications from the date the plan was deemed complete (30 CFR 250.204(i)). The state may not receive a plan for several days after it has been found complete, and the MMS often requires comments by 20 days after they deem a plan complete. This results in a little more than two weeks for a state to read the EP and supporting documents and provide comments under OCSLA. Such a short time period is unrealistic for complex exploration projects. During the comment period, the MMS prepares an environmental assessment, and the applicant and certified verification agent may prepare information that is needed for a state to make meaningful comments on the EP. A change to OCSLA to allow the MMS to have a longer comment period before making a decision would alleviate this problem. Since permits cannot be issued before the state completes its review, or consistency is presumed, such a change would not delay a project.

For DPPs, the MMS must approve, disapprove or require changes to the plan within 60 days after the state's comment period unless an EIS is prepared.<sup>2</sup> The OCSLA comment period for states is limited to 60 days. Considering the complexity of projects in Arctic waters, this time period is too short to develop meaningful comments. In addition, if the MMS decides there will be an EIS, the state is still required to submit its comments under OCSLA within 60 days without critical information that is developed during preparation of the EIS. Considering the fact that EIS preparation for DPPs can take years in Alaska, the 60-day requirement is unrealistic. It appears that a change to the OCSLA regulations could be made to remedy this situation without changing OCSLA itself.<sup>3</sup>

While the state may choose not to submit comments under the OCSLA process, it must complete its consistency review within six months after beginning the review. The state review begins when it receives the consistency certification, the DPP and necessary data and information (15 CFR 930.58). Considering the length of time it takes to complete an offshore EIS in Alaska, the state would be forced to make a consistency finding before

<sup>2</sup> The MMS must make a decision 60 days after the 60-day comment period unless there is an EIS developed. In that case, the MMS must make a decision within 60 days of release of the final EIS (30 CFR 250.204(i)).

<sup>3</sup> OCSLA specifies a 60-day comment period for instances where a DPP does not involve a major federal action, that is, when only an EA would be prepared (43 U.S.C. 1351(f) - (g)). The act does not specify a time period for comments when a project involves a major federal action, that is, when an EIS is required. The OCSLA regulations, however, limit the comment period to 60 days whether an EA or and EIS is required.

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the end of the six-month period and long before issuance of the final EIS.<sup>4</sup> It should be noted that major issues may not be resolved at the draft EIS stage, and the final alternative may not be known until after the final EIS. This was the case for the Northstar Project which involved the first subsea oil pipeline in the Arctic Ocean.

4. *"Whether a regulatory provision for a 'general negative determination,' similar to the existing regulation for 'general consistency determinations,' 15 CFR 930.36(c), for repetitive Federal agency activities that a Federal agency determines will not have reasonably foreseeable coastal effects individually or cumulatively, would improve the efficiency of the Federal consistency process."*

The ANPR does not provide enough information about why a general negative determination would be advantageous. We have not encountered situations that would justify creation of a new category of federal consistency determinations.

OCS oil and gas lease sales are the primary, if not only, federal OCS activity in Alaska subject to consistency reviews. These sales have been subject to ACMP consistency reviews since Congress enacted changes to the CZMA in 1990. Federal OCS lease sales would likely involve reasonably foreseeable effects to coastal uses and resources, so this federal activity would require preparation of a federal consistency determination. In the event there were a situation where reasonably foreseeable effects to coastal resources or uses are not expected, existing provisions within the CZMA regulations allow federal agencies to prepare a negative determination. We are not aware of repetitive federal agency activities related to the OCS, so it appears that no efficiency would be gained by this provision.

5. *"Whether guidance or regulatory action is needed to assist Federal agencies and State CMPs in determining when activities undertaken far offshore from State waters have reasonably foreseeable coastal effects and whether the 'listing' and geographic location' descriptions in 15 CFR 930.53 should be modified to provide additional clarity and predictability to the applicability of State CZMA Federal Consistency review for activities located far offshore."*

The ANPR does not specify what kinds of activities located far offshore would not have potential effects to coastal resources or uses. We are not aware of situations in Alaska or in other states where OCS activities would not have reasonably foreseeable effects. For oil and gas activities, the possibility of an oil spill that would affect coastal resources and uses is enough reason to justify a consistency review.

6. *"Whether multiple federal approvals needed for an OCS EP or DPP should be or can be consolidated into a single consistency review. For instance, in addition to the permits described in detail in EPs or DPPS, whether other associated approvals, air and water*

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<sup>4</sup> Federal CZMA regulations provide for an extension or stay of the six-month period if the state and the applicant agree (15 CFR 930.60(a)(3)). It is possible, however, that the applicant would not agree to an extension, and the state would be forced to make a determination without critical project information.

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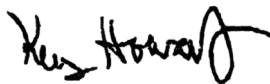
*permits not "described in detail" in an EP or DP, can or should be consolidated in a single State consistency review of the EP or DPP."*

Current CZMA regulations provide for consolidating reviews of OCS projects, and this is a routine practice in Alaska. 15 CFR 930.59 requires applicants to consolidate related federal license or permit activities "to the extent practicable." The only problems we have encountered related to this topic are a few isolated incidents where a federal agency was not aware that they could not issue an air permit before completion of the state's consistency review. In these cases, a phone call solved the problem, and the review remained consolidated.

In conclusion, we do not think there is sufficient justification to re-open the CZMA regulations at this time. The most recent changes to the regulations became effective less than two years ago, and there has not been enough time to determine that changing them will solve the problems. Before opening the regulations to changes, we suggest a thorough analysis of problems be completed followed by a meeting of stakeholders. Through such a process, other alternatives to solving the problems could be discussed. The creation of region-specific MOUs may be one approach that would resolve problems without re-opening the regulations. This approach would allow each state and the MMS to address issues that would be best addressed on a regional basis.

This concludes remarks of the State of Alaska on the ANPR. Please contact me by calling (907) 465-8794 should you have any questions about these comments.

Sincerely,



Kerry Howard  
Acting Director

cc: John Goll, Director, Alaska Region, MMS  
Kerry Kehoe, Coastal States Organization